U.S. Senate
Republican Policy
Committee

Don Nickles, Chairman
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Legislative Notice

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No. 1 January 5, 1995

S. 2, The "Congressional Accountability Act of 1995" ("Congressional Coverage")

Calendar No. 1

S. 2 was introduced January 4, 1995, by Senators Grassley and Lieberman and 29 other sponsors and placed directly on the Senate Calendar. It was not reported from a committee, and there is no committee report.

NOTEWORTHY

- Under unanimous consent agreements of January 4, the Senate will move to consideration of S. 2 after adoption of S. Res. 14. This could occur as early as 11:45a.m. today.
- S. 2 will extend 11 civil rights and labor laws to the Senate, the House of Representatives, and the instrumentalities of Congress (e.g., the Library of Congress, the Architect of the Capitol, GAO, GPO, CBO, OTA). Those laws are listed in the Highlights section, below.
- S. 2, as its number implies, is a top priority of the new Republican majority in the Senate. Leaders in both Houses of Congress hope to have a bill on the President's desk very soon.
- S. 2 has many similarities with S. 2071, the Lieberman-Grassley bill that was introduced on May 4, 1994, and referred to the Committee on Governmental Affairs. Hearings were held, but no further action occurred on S. 2071. Instead, the committee on October 3, 1994, favorably reported H.R. 4822, which had passed the House of Representatives on August 10, 1994, by a vote of 427-4. The committee report on H.R. 4822, S. Rept. 103-397, provides helpful background information on congressional coverage.
- As one of its first orders of business on the first day of the 104th Congress, the House of Representatives passed H.R. 1, a congressional coverage bill identical to H.R. 4822 as it passed the House last Congress. The vote was 429-0. After the Senate passes S. 2, the House will revisit the issue.

HIGHLIGHTS

- S. 2 applies the following laws to Congress in the manner prescribed by the bill --
    1. Fair Labor Standards Act of 1938
    2. Title VII of the Civil Rights Act of 1964
    3. Americans With Disabilities Act of 1990
    4. Age Discrimination in Employment Act of 1967
    5. Family and Medical Leave Act of 1993
    6. Occupational Safety and Health Act of 1970
    7. Labor-management and employee relations provisions of chapter 71 of Title 5, United States Code [sometimes called the Federal Labor Management Relations Act (1978)]
    8. Employee Polygraph Protection Act of 1988
    9. Worker Adjustment and Retraining Notification Act of 1988
    10. Rehabilitation Act of 1973, and
    11. Veterans' re-employment provisions of chapter 43 of Title 38, United States Code [sometimes called the Veterans' Reemployment Act (1974)].

- The bill establishes within the Legislative Branch an independent Office of Compliance. The **Office of Compliance** will be overseen by a five-member board of directors. The board is charged with enforcing the requirements of S. 2, and the board shall promulgate appropriate regulations. The regulations must be approved by one or both Houses. The Office shall have an executive director, a general counsel, and other employees. Such sums as may be necessary are authorized to be appropriated for expenses of the Office of Compliance. Title III.

- Under S. 2, the **remedies** which are available to persons in the private sector are extended to employees of Congress and its instrumentalities for all the statutes listed above which provide a private right of action. Sections 201-206.

- **Attorney's fees** may be awarded to prevailing parties, as well as interest on judgments. Sec. 225(a),(b).

- "No civil penalty or **punitive damages** may be awarded with respect to any claim under" S. 2, and the rights and remedies of S. 2 are exclusive. Sec. 225(c), (d). [emphasis added]

- No remedies are available unless the complaining party first completes **counseling and mediation**. Sec. 225(e).

- Nothing in S. 2 shall be construed to authorize **enforcement by the executive branch.** Sec. 225(f)(3).

- Members of Congress are not personally liable for damages. This policy is consistent with the holdings of most Federal circuit courts in cases involving private parties.

- Section 203 applies the **Fair Labor Standards Act** to Congress, which concerns minimum wage and maximum hours. Most professional and administrative employees of the Congress would be exempt, just as are most executive, administrative and professional employees in the private sector. Section 203 (a)(3) provides that "covered employees may not receive **compensatory time** in lieu of overtime compensation."

- Each employing office and each covered employee is required to comply with relevant provisions of the **Occupational Safety and Health Act.** Under S. 2, the General Counsel of the Office of Compliance exercises the authority that otherwise would be exercised by the Secretary of Labor. Sec. 215.

- It shall not be a violation of law to make employment decisions based on **party affiliation**, domicile, or political compatibility. Sec. 502.

- Section 207 makes it unlawful for an employing office to intimidate or take reprisal against any covered employee who has initiated proceedings, made a charge, or testified in a hearing or other proceeding.

- Title IV sets out the **dispute resolution procedures**. Those procedures are counseling, mediation, and then either (a) an administrative process featuring a formal complaint and hearing, Board review, and judicial review by the United States Court of Appeals for the Federal Circuit, or (b) a civil action in Federal district court.

- "All **counseling** shall be strictly confidential, except that the Office [of Compliance] and a covered employee may agree to notify the employing office of the allegations. All **mediation** shall be strictly confidential." Subsequent proceedings shall also be confidential except in a few circumstances which are specified. Final decisions generally will be made public, however. Sec. 416.

- "The authorization to bring **judicial proceedings** [in S. 2] shall not constitute a waiver of sovereign immunity for any other purpose, or of the privileges of any Senator or Member of the House of Representatives under article I, section 6, clause 1, of the Constitution, or a waiver of any power of either the Senate or the House of Representatives under the Constitution, including under article I, section 5, clause 3, or under the rules of either House relating to records and information within its jurisdiction." Sec. 413.

- Each House's **ethics committee** maintains full authority to discipline members, officers, or employees for violating nondiscrimination rules. Sec. 503.

- The Judicial Conference of the United States is charged with preparing a report on **covering the Judicial Branch** under the civil rights and labor laws that are included in S. 2. Sec. 505.

- The effective date for most of the provisions in S. 2 is one year after the date of enactment. Some provisions under OSHA and ADA allow for a compliance period. The Board of Directors of the Office of Compliance is to be appointed within 90 days of enactment and the Executive Director within 90 days thereafter.

BACKGROUND

The following descriptions of congressional coverage under current law are taken from last year's report of the Committee on Governmental Affairs that accompanied H.R. 4822. [See also the appendices to this Notice.]

> "Senate employees enjoy the rights and protectionS of all of the antidiscrimination laws, as well as the Family and Medical Leave Act, albeit with a different enforcement mechanism than is provided in the private sector or the executive branch. However, the Fair Labor Standards Act and the Equal Pay Act do not apply to the Senate. Also, Senate employees do not have a right to trial in U.S. District Court, but they do have a right to trial before a panel of independent hearing examiners, and judicial review by a U.S. Court of Appeals." S. Rept. 103-397, p.3.
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> "House employees enjoy rights and protections against discrimination, as well as rights under the Fair Labor Standards Act, the Equal Pay Act, and the Family and Medical Leave Act. However, the house process of enforcing and redressing these rights and protections is somewhat less independent than that in the Senate, and it affords no judicial review." Id.
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> "The various congressional instrumentalities have been made subject to some of these antidiscrimination and employee protection laws, but not to others. Coverage is uneven.

APPENDIX A. -APPLICATION OF LAWS

	Senate	House	CBO	GAO	GPO	Library (w/CRS)	OTA	Executive Branch
Civil Rights/ Title VII...	Yes/Internal enforcement.	Yes/Internal enforcement.	Same as House.	Yes/Internal enforcement.	Yes.....	Yes/Internal enforcement.	Yes/Internal enforcement.	Yes.
Age Discrimination in Employment Act.	Yes/Internal enforcement.	No.....	No.....	Yes/Internal enforcement.	Yes.....	Yes/Internal enforcement.	Yes/Internal enforcement.	Yes.
Americans With Disabilities Act.	Yes/Internal enforcement.	Yes/Internal enforcement.	Same as House.	Yes/Internal enforcement.	Yes/Internal enforcement.	Yes/Internal enforcement.	Yes/Internal enforcement.	No.*
Rehabilitation Act.	Yes/Internal enforcement.	No.....	No.....	No.....	No.....	No.....	No.....	Yes.
National Labor Relations Act.	No.....	No.....	No.....	No.....	No.....	No.....	No.....	No.
Federal Labor-Management Relations.	No.....	No.....	No.....	Yes/Internal enforcement.	Yes.....	Yes.....	No.....	Yes.
Occupational Safety and Health Act.	No.....	No.....	No.....	No.....	No.....	No.....	No.....	Yes/by Executive Order.
Fair Labor Standards Act.	No.....	Yes/Internal enforcement.	Same as House.	Yes/Internal enforcement.	Yes/Internal enforcement.	Yes/Internal enforcement.	No.....	Yes.
Equal Pay Act.	No.....	Yes/Internal enforcement.	Same as House.	Yes/Internal enforcement.	Yes/Internal enforcement.	Yes/Internal enforcement.	No.....	Yes.
Worker Adjustment and Retraining Notification.	No.....	No.....	No.....	No.....	No.....	No.....	No.....	No.
Employee Polygraph Protection Act.	No.....	No.....	No.....	No.....	No.....	No.....	No.....	No.
Employee Retirement Income Security Act.**	No.....	No.....	No.....	No.....	No.....	No.....	No.....	No.
Ethics in Government Act.	Yes.....	Yes.....	Yes.....	Yes.....	Yes.....	Yes.....	Yes.....	Yes.
Ethics Reform Act.	Yes.....	Yes.....	Yes.....	Yes.....	Yes.....	Yes.....	Yes.....	Yes.
Social Security Act.	Yes.....	Yes.....	Yes.....	Yes.....	Yes.....	Yes.....	Yes.....	Yes.
Freedom of Information Act.	No.....	No.....	No.....	No.....	No.....	No.....	No.....	Yes.
Privacy Act.	No.....	No.....	No.....	No.....	No.....	No.....	No.....	Yes.

* 1. Executive Branch employees are covered by the provisions of the Rehabilitation Act of 1973.
**2. Members and Congressional Employees participate in the Civil Service Retirement System and Federal Employee Retirement System.
Source: Senate S. rept. 103-397 page 69

APPENDIX B

Madison in *Federalist* No. 57

James Madison's perspicacity and wisdom are limitless, it appears, and on this issue, as on so many others, his advice is being repeated still. The following excerpt from *The Federalist* is being used frequently in discussions about congressional coverage:

> "[The House of Representatives is] restrain[ed] from oppressive measures [because] they can make no law which will not have its full operation on themselves and their friends, as well as on the great mass of the society. This has always been deemed one of the strongest bonds by which human policy can connect the rules and the people together. It creates between them that communion of interests and sympathy of sentiments of which few governments have furnished examples; but without which every government degenerates into tyranny. If it be asked what is to restrain the House of Representatives from making legal discriminations in favor of themselves and a particular class of the society? I answer, the genius of the whole system, the nature of just and constitutional laws, and above all the vigilant and manly spirit which actuates the people of America, a spirit which nourishes freedom, and in return is nourished by it.
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> "If this spirit shall ever be so far debased as to tolerate a law not obligatory on the Legislature as well as on the people, the people will be prepared to tolerate anything but liberty." *The Federalist* No. 57 (J. Madison) [J.E. Cooke ed. 1961, pp. 386-87].

APPENDIX C

Congressional Coverage and the Constitution

[The following statement is taken from the Final Report of the Joint Committee on the Organization of Congress, S. Rept. No. 103-215, vol. II, 132-34 (Dec. 1993). This version has been edited.]

The exclusion of Congress from various Federal laws has been partially explained in terms of both policy and constitutional considerations. Obviously, the legal and policy rationale will vary depending on the particular law at issue. However, the constitutional bases most often cited for excluding Congress from the coverage of some employment and labor legislation includes the speech or debate clause immunity of Members and the separation of powers doctrine.

The speech and debate clause, Art. I, sec. 6, cl. 1, protects Members from being "questioned in any other place" for their legislative acts. In *Davis v. Passman*, 442 U.S. 228 (1979), a divided Supreme Court held that an aide of a Member, discharged because the Member preferred a male for the job, had a cause of action under the due process clause of the Fifth Amendment to sue the Member for monetary damages. Because the lower court had not passed on the contention that the speech or debate clause precluded the suit, the Supreme Court declined to do so at that stage. The Court did hold that the speech and debate clause was the only source of immunity for Members of Congress under the separation of powers doctrine. Chief Justice Burger, dissenting along with Justices Powell and Rehnquist, argued that separation of powers in combination with the speech or debate clause, both sharing common roots, did not permit the suit to go forward. Justice Stewart, dissenting, . . . would have remanded so that the court of appeals could decide [the speech or debate issue].

In two decisions, the United States Court of Appeals for the District of Columbia Circuit attempted to formulate a standard for applying the clause to congressional employment decisions. The discharge of the manager of the House of Representatives' restaurant was the issue in *Walker v. Jones*, 733 F.2d 923 (D.C. Cir.), *cert. denied*, 469 U.S. 1036 (1984). Essentially, the court focused its inquiry on whether the employee's duties could be viewed "as work that significantly informs or influences the shaping of our nation's laws" or whether an employee's duties were "peculiar to a Congress Member's work as legislator," and "intimately cognate . . . to the legislative process." Under that standard, the clause did not apply to the employee.

In *Browning v. Clerk, U.S. House of Representatives*, 789 F.2d 923 (D.C. Cir.), *cert. denied*, 479 U.S. 996 (1986), the discharge of an official reporter for the House of Representatives was challenged. The court held the congressional defendants to be immune under the speech or debate clause. The standard was "whether the employee's duties were directly related to the due functioning of the legislative process." If the employee's duties are "such that they are directly assisting members of Congress in the discharge of their functions, personnel decisions affecting them are legislative and shielded from judicial scrutiny."

However, some reconsideration of this developing case law may be called for in light of *Forrester v. White*, 484 U.S. 219 (1988). This case unanimously held that a State court judge did not have judicial immunity in a suit for damages brought by a probation officer whom he had fired. The Court explained that in determining whether immunity attaches to a particular official action it applies a "functional" approach: "Under that approach, we examine the nature of the functions with which a particular official

or class of officials has been lawfully entrusted, and we seek to evaluate the effect that exposure to particular forms of liability would likely have on the appropriate exercise of those functions. Officials who seek exemption from personal liability have the burden of showing that such an exemption is justified by overriding considerations of public policy. . . ." Thus, it is the "nature of the function performed, not the identity of the actor who performed it, that inform[s] our immunity analysis."

Judges have absolute immunity from liability for the performance of judicial function. See, *Stump v. Sparkman*, 435 U.S. 349 (1978). But when a judge acts in an administrative or legislative capacity, he enjoys no judicial immunity. In the Court's view, "Judge White was acting in an administrative capacity when he demoted and discharged Forrester. Those acts . . . may have been quite important in providing the necessary conditions of a sound adjudicative system. The decisions at issue, however, were not themselves judicial or adjudicative." Employment decisions, like many others, "are often crucial to the efficient operation of public institutions," yet they are not entitled to absolute immunity "even though they may be essential to the very functioning of the courts. . . ."

Forrester v. White was, of course, not a case governed by the speech or debate clause; it was brought under 42 U.S. Code §1983, which affords persons who have been denied their constitutional rights under color of State law a cause of action against State and local defendants. Nonetheless, the Court has adverted to speech or debate principles when passing on questions of legislative immunity in §1983 actions, emphasizing that the clause is one aspect of the common law principle of legislative freedom of speech. The Court has said "we generally have equated the legislative immunity to which state legislators are entitled under §1983 to that accorded Congressmen under the Constitution." *Supreme Court of Virginia v. Consumers Union*, 446 U.S. 719, 733 (1980).

If *Forrester v. White* hinges on the question of congressional immunity for labor or employment decisions, it strongly suggests that Members of Congress may have no immunity. The *Forrester* principle was applied by the D.C. Circuit in *Gross v. Winter*, 876 F.2d 165 (D.C. Cir. 1989), a case involving legislative immunity in a suit filed against a member of the D.C. City Council. However, the court in *Gross* declined to address the question of whether special considerations applicable to Members of Congress might warrant the continuing application of the *Browning* standard, a matter left equally obscure in *Forrester*. It is also uncertain whether Congress could, by statute, waive any speech or debate immunity that may pertain to personnel actions by a Member. Cf., *United States v. Helstocki*, 442 U.S. 477, 492 (1979).

The other constitutional concern, separation of powers, arises since administrative enforcement of Federal EEO and labor laws is generally vested in executive agencies. Allowing an executive agency to enforce these laws against Members of Congress might, in some situations, violate the Court's separation of powers standards by "disrupt[ing] the proper balance between the coordinate branches by prevent[ing] . . . [Congress] from accomplishing its constitutionally assigned functions." *Morrison v. Olson*, 487 U.S. 654, 695 (1988).